Supreme Court, U.S.
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No. 99-1101

In The
Supreme Court of the United States

URVASHI B. PATEL, an individual,

Petitioner,

v.

OMH MEDICAL CENTER, INC., an Oklahoma corporation, ST. FRANCIS HOSPITAL, INC., an Oklahoma corporation, LARRY D. HENRY, an individual and ARRINGTON, KIHLE, GABERINO & DUNN, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Court should review a claim that the Oklahoma Supreme Court violated Petitioner's right to equal protection of the laws in affirming the trial court's dismissal of her lawsuit, despite the fact that Petitioner failed to raise that issue in a timely manner in the Oklahoma courts.

2. If so, whether the Oklahoma Supreme Court violated the Petitioner's right to equal protection in upholding the trial court's dismissal of Petitioner's suit seeking damages for fraud or deceit and prima facie tort (spoliation of evidence) arising out of alleged misconduct during trial of a previous case on the grounds that under Oklahoma law such allegations failed to state a claim for which relief in tort can be granted.

PARTIES TO THE PROCEEDINGS

Petitioner, Urvashi B. Patel, was the plaintiff and appellant in the courts below.

Respondents, OMH Medical Center, Inc., Saint Francis Hospital, Inc., Larry D. Henry, and Arrington Kihle Gaberino & Dunn, Inc. were the defendants and appellees in the courts below. OMH Medical Center, Inc. is an Oklahoma not-for-profit corporation. Saint Francis Hospital, Inc., is an Oklahoma not-for-profit corporation. Arrington Kihle Gaberino & Dunn, Inc. was a professional corporation at the time Petitioner's suit was filed below.

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STATEMENT OF JURISDICTION

As shown below, the Court lacks jurisdiction of this matter because Petitioner did not raise her equal protection argument until her petition for rehearing before the Oklahoma Supreme Court.

STATEMENT OF THE CASE

This case arises from the Oklahoma Supreme Court's affirmance of the trial court's dismissal of Petitioner's lawsuit against Respondents for failing to state a claim upon which relief could be granted. Petitioner sought damages for fraud or deceit and prima facie tort (spoliation of evidence) against corporate and individual defendants, as well as their counsel and law firm, for acts which allegedly occurred during a jury trial. However, Oklahoma law does not recognize a civil action for damages caused by perjury, fraud, or deceit, on the facts alleged by Petitioner. Oklahoma law likewise does not recognize spoliation of evidence or prima facie tort as an actionable claim. Accordingly, Petitioner's claims were dismissed by the trial court and that dismissal was affirmed on appeal.

Petitioner now argues that the Oklahoma Supreme Court's affirmance of the district court's dismissal of Petitioner's Petition violates the Equal Protection Clause because it purportedly deprives one class – plaintiffs – of a civil remedy for litigation misconduct while another class – defendants – have such remedies. Petitioner argues that defendants have access to two causes of action, malicious prosecution and abuse of process, to remedy litigation misconduct by plaintiffs, and that plaintiffs have no such causes of action to remedy litigation misconduct by defendants.

This case arises in the context of three separate state court lawsuits: *Patel I, Patel II* (which is the subject of a

separate Petition for Writ of Certiorari in this Court, Case No. 99-1079, in which Petitioner alleges that the decision of the Oklahoma Supreme Court violates her right to due process), and *Patel III* (this case).[1]

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[1] Respondents are aware of their obligation pursuant to Sup. Ct. R. 15.2 to address any misstatements of fact or law contained in Patel's Petition. However, Respondents respectfully submit that the Petition is so replete with misstatements, overstatements and exaggerations of fact and law that a complete recitation of those misrepresentations would cause Respondents to run afoul of this Court's requirement of brevity. Therefore, Respondents have included their own Statement of the Case, which implicitly refutes the misstatements in Patel's own such attempt. Further, the most egregious and important of Patel's misstatements are specifically addressed herein. An example of one of Patel's more blatant misrepresentations is her allegation that the Oklahoma Supreme Court did not even purport to disturb the trial court's "finding" of fraud in *Patel II*. Pet. 10. To the contrary, the supreme court clearly "disturbs" the finding by holding that the trial court abused its discretion in making such a finding without first conducting an evidentiary hearing. *See, e.g.*, Pet. App. 35a-36a. An additional example of an egregious misstatement is Patel's claim that the trial court in *Patel II* determined that the alleged fraud was committed intentionally. Pet. 6. In fact, the trial court made no finding that Respondents made any knowing or intentional misstatement. Resp. App. 1a-5a. Additionally, at page 4 of her Petition, Patel states "[t]he entire defense presented by Respondents to Petitioner's tort claims at the trial of Patel I consisted of perjurious testimony from LDH and AKG&D on behalf of all the Respondents in this case and documentary 'evidence' despoiled and/or manufactured by all such Respondents, with the active participation of such lawyers, admission of which was obtained only by such Respondents knowingly making material, false representations to Petitioner and Judge Wiseman on which they relied to their detriment. The jury's verdict adverse to plaintiff's tort claims resulted primarily, if not exclusively, from such fraudulent misconduct. . . ." Respondents deny the allegations against them, deny that "the entire defense" of Respondents was based on any of the matters which Patel alleges as constituting litigation misconduct, and further deny that the jury's verdict in *Patel I* resulted primarily or exclusively from the conduct alleged by Patel as constituting litigation misconduct. Also on page 4, Patel alleges that Respondents

A. *"PATEL I"*

Petitioner, Urvashi B. Patel ("Patel"), is a physician who was employed as an anesthesiologist by Respondent OMH Medical Center, Inc. ("OMH"). In October 1993, after months of discussions between OMH and Patel, OMH terminated Patel's employment contract by invoking the termination clause contained therein. OMH paid Patel the $50,000 contract termination fee, offset by the amount of the unearned portion of the medical malpractice insurance premium OMH had prepaid as part of Patel's compensation. In November 1993, Patel sued Respondents, alleging breach of contract and the torts of emotional distress, conversion, and prima facie tort. (She withdrew the claim for conversion at the pre-trial conference.) Patel alleged that Respondents attempted extortion by threatening to withhold letters of recommendation unless she waived her rights to the contract termination fee.

Patel alleged that OMH refused to provide her with anything but a neutral reference upon her termination from the hospital, which stated only her position and dates of employment at OMH. Patel's damages witness at trial testified that it would be all but impossible for Patel to find a good job with such a reference. Respondents then offered Exhibit 1 to

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threatened to ruin her medical career and attempted "extortion" through their negotiations over her termination fee. Respondents also dispute this characterization of events. Similarly, on page 5 of her Petition, Patel states that "[w]hile conducting discovery incident to such Petition to Vacate, Petitioner obtained documentary evidence unambiguously proving Respondents' fraud and evidentiary proof of additional, material frauds also committed by Respondents, also with the active participation of their attorneys." Respondents deny this contention as well.

rebut that testimony on the issue of damages by showing that Patel was in fact hired by OMH despite the fact that her file contained an unfavorable reference. Exhibit 1 was not introduced for the truth of the matters contained therein.

Exhibit 1 is a copy of a recommendation from Patel's previous employer, Scotland Memorial Hospital. The reference was issued in response to OMH's hiring-process inquiries about Patel's performance at Scotland Memorial, and is one of several personal and professional references in Patel's OMH credentialing file. The recommendation is unfavorable, stating that Patel's performance had been average to below average and recommending that she be monitored before being granted full medical privileges at OMH.

After a three-day jury trial, the jury returned a verdict awarding Patel $12,464 against OMH on her breach of contract claim, which represented the amount OMH set off against the termination fee for the prepaid malpractice insurance premiums. The jury found in favor of Respondents on the tort claims. Both parties appealed the verdict to the Oklahoma Court of Appeals, which affirmed the trial court. The Oklahoma Supreme Court denied Patel's Petition for Certiorari to review the Court of Appeals' decision. The judgment became final in July 1996.

B. *"PATEL II"*

In August 1996, Patel accepted from OMH the amount due upon the judgment in full payment and satisfaction thereof. Less than one month later, however, Patel filed a petition to vacate the adverse jury verdict on her tort claims pursuant to OKLA. STAT. tit. 12, § 1031(4) (1991). Patel alleged that Respondents and their counsel, Larry D. Henry, had made false representations to the court during the trial with respect to

Exhibit 1, and that the court relied upon such misrepresentations in admitting the exhibit. Patel further alleged that the admission of Exhibit 1 tainted the jury verdict because its unfavorable contents prejudiced the jury against Patel and because it falsely rebutted one of Patel's principal contentions at trial.

Respondents filed a motion to dismiss Patel's petition to vacate, which the trial court denied without oral argument, and Patel filed a motion for summary judgment. A specific ruling on the motion for summary judgment was never entered. However, on November 14, 1997, without having first conducted an evidentiary hearing on the issue of whether fraud occurred during the *Patel I* trial, the trial court vacated the judgment. Respondents appealed the trial court's order to the Oklahoma Supreme Court, which reversed and remanded the case for further proceedings. As noted above, that decision of the Oklahoma Supreme Court is the subject of a separate Petition for Writ of Certiorari filed by Patel.

C. "*PATEL III*": THE INSTANT CASE

In February 1997, while *Patel II* was pending in the trial court, Patel filed a third action, this one, against the defendants in *Patel I* and *Patel II*, as well as their attorney, Larry D. Henry, and his law firm, Arrington Kihle Gaberino & Dunn ("AKG&D"). Patel sought compensatory and punitive damages for acts of fraud, deceit and spoliation of evidence allegedly occurring during the *Patel I* trial. Respondents filed a motion to dismiss pursuant to OKLA. STAT. tit. 12, § 2012(B)(6) (1991), on the grounds that the petition failed to state a claim upon which relief could be granted. The trial court granted the motion and dismissed the case. Patel appealed to the Oklahoma Supreme Court.

D. THE OKLAHOMA SUPREME COURT'S DECISION

Although the Oklahoma Supreme Court did not formally consolidate the appeals from *Patel II* and *Patel III*, it considered the two appeals together and issued a single opinion disposing of both appeals, which was filed on April 27, 1999. The court affirmed the trial court's dismissal of Patel's petition in *Patel III* (against Respondents herein), and reversed and remanded the trial court's decision in *Patel II*.

The Oklahoma Supreme Court reviewed *de novo* the trial court's dismissal of Patel's action in *Patel III* to determine if, taking all of Patel's allegations as true, she was precluded from recovering as a matter of law. The court held that neither the Oklahoma Constitution, Oklahoma statutes, nor Oklahoma common law provides for civil damages for such claims of perjury, "whether denominated perjury, fraud, deceit, or 'prima facie tort'".[2] Pet. App. 39a. The court also declined to provide redress for alleged litigation-related misconduct through adoption of a new tort, stating that Patel has sufficient other remedies available to her. Pet. App. 39a-40a. Likewise, because Oklahoma does not recognize a claim for prima facie tort or spoliation of evidence, the court affirmed the trial court's dismissal of that claim. Pet. App. 40a. The court also declined to consider whether that tort should be recognized,

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[2] The court specifically rejected application of the civil remedy contemplated by the criminal statute, OKLA. STAT. tit. 21, § 575 (1991), as such civil remedy requires an antecedent criminal conviction which does not exist in this case. Pet. App. 37a n.61.

because the conduct of which Patel complained did not present a case of spoliation of evidence.[3] Pet. App. 40a.

Patel filed petitions for rehearing of the Oklahoma Supreme Court's decisions in both *Patel II* and *Patel III*. Patel raised her equal protection argument for the first time in her petition for rehearing in this case. Pet. 11. Both petitions were denied.

REASONS FOR DENYING THE PETITION

Nothing in this case warrants review by the Court. No federal statutes are implicated. No broad policy questions are at issue. No Supreme Court decisions are in "irreconcilable conflict" with the Oklahoma Supreme Court's decision in this case. Apart from a baseless equal protection claim that was not presented below, no constitutional questions are asserted.

Patel contends that the Oklahoma Supreme Court refused to consider the equal protection implications of its decision and failed to suggest any rational basis for doing so. Pet. 2. However, that issue was not before the Oklahoma court, as Patel failed to raise her claim until she petitioned for rehearing. Thus, Patel's equal protection argument should not be reviewed by this Court as the Oklahoma courts were not given a timely opportunity to address it.

However, even if Patel's Petition is subject to review, review should not be granted because Patel wholly fails to

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[3] "Spoliation" was defined in the Oklahoma Supreme Court's decision as "'[t]he destruction of evidence . . . .The destruction, or the significant and meaningful alteration of a document or instrument.'" Pet. App. 39a. The court determined that the misconduct alleged in *Patel III* did not consist of the destruction or alteration of a document. Pet. App. 40a.

present any equal protection issue. She contends that the Oklahoma Supreme Court's decision "barred" Patel and all other similarly situated plaintiffs from seeking redress for fraudulent misconduct committed by defendants, by "prophylactically immunizing defendants and their attorneys merely because of their status as such." Pet. 2. The decision of the Oklahoma Supreme Court has no such effect. That decision holds that there is no cause of action in Oklahoma for tort damages based simply on allegations of litigation misconduct – not for plaintiffs and not for defendants. In other words, this case simply does not present any equal protection issue because the Oklahoma Supreme Court's opinion does not treat plaintiffs differently from defendants.

Patel's position misinterprets the decision below and Oklahoma law. First, Patel's allegations of litigation misconduct against Respondents would not support a malicious prosecution or abuse of process action based upon Oklahoma law on the part either of a plaintiff or a defendant. Second, actions for abuse of process are equally open to both plaintiffs and defendants under Oklahoma law, upon assertion of facts supporting such claims, and nothing in *Patel III* holds otherwise. Rather, the limitations implicitly placed upon that cause of action by the Oklahoma Supreme Court's opinion – *i.e.*, implicitly excluding litigation misconduct as a basis for an abuse of process claim – are equally applicable to both plaintiffs and defendants. Finally, although malicious prosecution claims are inherently available only to defendants (or to plaintiffs as counter-defendants, *see Greenberg v. Wolfberg*, 890 P.2d 895, 901 n. 21 (Okla. 1994)) that presents no equal protection issue because *Patel III* does not recognize litigation misconduct as a basis for a malicious prosecution claim by *anyone*. Patel thus has no equal protection argument.

A. PATEL'S EQUAL PROTECTION CLAIM IS NOT REVIEWABLE

Patel's equal protection claim is not reviewable here because she did not raise that claim until her petition for rehearing before the Oklahoma Supreme Court. A federal claim raised for the first time in a petition for rehearing is not properly preserved for review by this Court when, as in this case, the state court does not rule on the claim in denying the petition for rehearing. *See Adams v. Robertson,* 520 U.S. 83, 89 n.3 (1997); *Radio Station WOW, Inc. v. Johnson,* 326 U.S. 120, 128 (1945); *see also* Robert L. Stern et al., *Supreme Court Practice* 127 (7th ed. 1993).[4]

The Court has recognized an exception to this rule for litigants with no opportunity to anticipate or press their federal claims prior to filing petitions for rehearing. *See Estate of Wilson v. Aiken Indus., Inc.* 439 U.S. 877, 879 (1978) (Blackmun, J., concurring in denial of certiorari); *see also* Stern et al., *supra*, at 129. However, the exception does not apply here. Patel had ample opportunity to anticipate and press any equal protection claim many times prior to her petition for rehearing. First, she had the opportunity in the trial court. There, Respondents filed a motion to dismiss for failure to state

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[4] Patel cites *PruneYard Shopping Center v. Robins,* 447 U.S. 74, 85-86 n.9 (1980) and *Richards v. Jefferson County, Ala.,* 517 U.S. 793, 797-98 n.3 (1996) for the proposition that a constitutional argument is timely when raised in the petition for rehearing. However, in *PruneYard,* the Court explicitly noted that the constitutional question had been raised by the petitioner in the California Supreme Court. *Richards* relies exclusively on *PruneYard.* Therefore, these decisions are distinguishable from the situation in this case, where Petitioner was on notice at the trial court level of any alleged violation of her constitutional rights which she asserts now. *See* Charles A. Wright et al., *Federal Practice and Procedure* § 4022, at p. 332 n.27 (2d ed. 1996).

a claim. If Patel believed a ruling in Respondents' favor on that motion would violate the Equal Protection Clause, she could have raised her equal protection argument to the trial court in response to the motion to dismiss. Or she could have filed a motion for reconsideration with the trial court and raised it. *See* OKLA. STAT. tit. 12, § 990.2 (1991). Resp. App. 5a. She did neither.

Patel also did not raise the issue on appeal to the Oklahoma Supreme Court. Patel contends that she was precluded under Oklahoma's appellate rules of procedure from filing any briefs on appeal except the brief she had filed in the trial court. Pet. 10-11. It is true that Rule 1.36(g) of the Rules of the Oklahoma Supreme Court, Resp. App. 6a, provides that the court's appellate review of a trial court's order granting a motion to dismiss will be confined to the record presented to the trial court. However, the rule also authorizes a party to file a motion for leave to submit appellate briefs. Patel declined to seek leave to file an additional brief to raise the equal protection claim. However, she did file a "Supplemental Suggestion Regarding Clearly-Controlling Legal Authority Not Included By Either Party In Their Briefs, Due Solely To Inadvertence," in which she cited the criminal statute specifically rejected by the Oklahoma Supreme Court on appeal. Resp. App. 7a-10a. She did not raise an equal protection claim in that filing. Patel also filed a Motion to Retain Appeal in Supreme Court Pursuant to Rule 1.24, in which she requested the Oklahoma Supreme Court to retain the appeal for decision, rather than assigning it to the court of appeals for initial decision. Resp. App. 11a-15a. In that motion, she urged the supreme court to retain the appeal on three grounds, none of which included an equal protection claim. *Id.*

The Oklahoma Supreme Court retained the appeal, and then affirmed the trial court's decision. Nothing about the supreme court's affirmance created a previously-unavailable occasion or opportunity for Patel to present her equal protection argument, and when she raised the claim for the first time in her petition for rehearing, the Oklahoma Supreme Court denied the petition without comment. Pet. App. 46a. Thus, under well-established rules of this Court, Patel's failure to raise the equal protection claim below, despite having the opportunity to do so, defeats her efforts to raise the matter now, and the exception for litigants with no opportunity to anticipate or press their federal claims prior to filing a petition for rehearing clearly does not apply here.

B. PATEL'S EQUAL PROTECTION CLAIM IS WITHOUT MERIT

The Equal Protection Clause of the Fourteenth Amendment provides: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." The Equal Protection Clause requires courts to "treat like cases alike" but also allows courts to "treat unlike cases accordingly." *Vacco v. Quill,* 521 U.S. 793, 799 (1997).

When an equal protection claim is asserted, a threshold issue is whether a governmental unit has adopted a rule that has a special impact on less than all of the people subject to its jurisdiction. *New York City Transit Authority v. Beazer*, 440 U.S. 568, 587-88 (1979). Only when there is unequal impact can there be an equal protection issue requiring analysis under this Court's equal protection jurisprudence.[5] Here, there is no

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[5] Under an equal protection analysis, a statute or rule of law is presumed to be valid, and will only be reviewed to determine if it violates

need for such an analysis because the Oklahoma Supreme Court's decision clearly does not impact plaintiffs as a class differently from defendants as a class.

Patel's equal protection argument turns on the false premise that the Oklahoma Supreme Court's decision denies plaintiffs as a class the right to legal remedies for litigation misconduct which are available to defendants as a class. The alleged litigation misconduct Patel refers to is: perjury, spoliation, manufactured evidence, misrepresentation, and fraud. Pet. 4. Patel cites two causes of action which she asserts are available to defendants, but not plaintiffs, to remedy litigation misconduct: (1) malicious prosecution and (2) abuse of process. Pet. 11.

Patel's premise for her equal protection argument is false because the Oklahoma Supreme Court's opinion does not distinguish between plaintiffs and defendants with respect to the remedies available to address litigation misconduct. The Oklahoma Supreme Court's decision in *Patel III* simply affirmed the trial court's ruling that Patel's allegations of litigation misconduct do not state a cause of action in Oklahoma. That is, under the Oklahoma Supreme Court's decision in *Patel III*, *neither* plaintiffs *nor* defendants are

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equal protection by considering whether it is "rationally related to a legitimate state interest," unless the law creates classifications based upon race, alienage, or national origin, and then it will be subject to strict scrutiny. *City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432, 440 (1985). Patel does not allege a classification based upon race, alienage, or national origin. Therefore, if the Court were to reach an equal protection analysis, the proper test would be to consider whether Oklahoma's allegedly different treatment of plaintiffs and defendants is rationally related to a legitimate state interest. As pointed out in text, no such analysis is necessary here because Patel's premise that the state court decision impacts plaintiffs differently from defendants is simply incorrect.

entitled to bring a cause of action for litigation misconduct as alleged by Patel. The court did not say that such a cause of action is available to defendants but not to plaintiffs, or that such a claim could be brought in a malicious prosecution or abuse of process action, but only by defendants.

Nothing in the Oklahoma Supreme Court's opinion suggests that the court would recognize a cause of action for malicious prosecution, abuse of process, prima facie tort or otherwise based on Patel's allegations, if only they were brought by a defendant. Moreover, litigation misconduct is in fact not a basis for a malicious prosecution claim under Oklahoma law, and so the fact that malicious prosecution claims are available only to defendants (or plaintiffs as counter-defendants) raises no equal protection issue in this case.[6] Also,

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[6] Although it is not an issue in this case, since Patel's allegations do not support a malicious prosecution claim in any event, it is obvious that by recognizing a cause of action for malicious prosecution, the common law treats defendants differently from plaintiffs: plaintiffs simply have no such claim (except to the extent a case contains a counterclaim which meets the elements of malicious prosecution). Patel does not contend that this circumstance constitutes an equal protection violation and cites no case to that effect. In other contexts, courts have held that such differential treatment of plaintiffs and defendants does not violate the Equal Protection Clause because plaintiffs and defendants are not similarly situated. At least two courts have considered the argument that different treatment of "plaintiffs" as a class and "defendants" as a class violates equal protection. Both found no violation. In *Wall v. Cherrydale Farms, Inc.*, 9 F. Supp. 2d 784 (E.D. Mich. 1998), the plaintiff alleged that a Michigan statute which allows a jury to apportion fault, even against a nonparty (such as an employer exempt from liability due to workers compensation laws), violates equal protection in that it allows the defendant in a personal injury action to argue the fault of an absent actor, while the actor's very absence prejudices the plaintiff's ability to make out her claim against the defendant. In rejecting this argument, the trial court stated:

> [U]nder equal protection analysis, plaintiff has to identify "similarly situated" individuals from whom she is being

nothing in the Oklahoma court's decision suggests that abuse of process claims are available only to defendants. In other words, this case simply does not present any equal protection issue because the Oklahoma Supreme Court's opinion does not treat plaintiffs differently from defendants.

Patel's allegations would not support a malicious prosecution claim by *anyone*. In Oklahoma, a malicious prosecution action is made up of five elements: (1) the bringing of an original action; (2) its successful termination in favor of the defendant; (3) want of probable cause to bring the action; (4) malice; and (5) damages. *Parker v. City of Midwest City,* 850 P.2d 1065, 1067 (Okla. 1993). The purpose of a

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> treated differently, and she has not done this . . . . Here, plaintiff does not explain how plaintiffs and defendants are similarly situated in the context of this statutory provision. I conclude that their interests are inapposite and that they are not similarly situated . . . . plaintiff's equal protection argument fails.

Id. at 788-89. Likewise, in *Barrett v. Carter,* 283 S.E.2d 609 (Ga. 1981), the court rejected an argument by plaintiff that state laws exempting from tort liability defendants under the age of thirteen, while allowing a defendant to defend a lawsuit by arguing the negligence of a plaintiff who is under thirteen, violates equal protection. The court stated:

> Both rules serve the public interest. While a defendant under 13 is protected by the one rule, the plaintiff under 13 is not allowed to ignore his or her lack of due care and recover damages from a defendant whose negligence is less than that of the plaintiff. Plaintiffs and defendants may be classified separately and treated differently for equal protection consideration.

Id. at 610 (citation omitted). Both cases recognize that the interests of plaintiffs and defendants will often differ, which justifies different treatment.

malicious prosecution action is to provide a remedy to a party against whom suit is brought or process is issued without probable cause. *See Greenberg v. Wolfberg*, 890 P.2d 895, 905 n.45 (Okla. 1994). Thus, no one would have a cause of action under Oklahoma law for malicious prosecution to remedy conduct such as that alleged by Patel, all of which purportedly took place during the litigation, rather than in its commencement.

Patel's allegations also do not form the basis for an abuse of process claim under Oklahoma law. An action for abuse of process requires: (1) the improper use of the court's process; (2) primarily for an ulterior or improper purpose; and (3) damage. *Bank of Oklahoma, N.A. v. Portis,* 942 P.2d 249, 255 (Okla. Ct. App. 1997). The litigation misconduct Patel alleges does not involve use of "process" as that concept is understood under Oklahoma law. In *Greenberg v. Wolfberg,* 890 P.2d 895 (Okla. 1994), the Oklahoma Supreme Court, in a footnote, states that "[t]he word 'process', as used in the tort of 'abuse of process', encompasses the entire range of *procedures* incident to the litigation process." *Id.* at 905 n.47 (emphasis added). The *Greenberg* court cites an Arizona case, *Nienstedt v. Wetzel,* 651 P.2d 876, 880 (Ariz. Ct. App. 1982). In *Nienstedt,* the court defines "process" to consist of "the noticing of depositions, the entry of defaults, and the utilization of various motions such as motions to compel production, for protective orders, for change of judge, for sanctions and for continuances." *Id.* at 880-81. Patel has made no allegations that Respondents' alleged misconduct involved the use of such processes. Therefore, it appears an action for abuse of process

would not lie under Oklahoma law for either a plaintiff or a defendant on facts such as those alleged by Patel here.[7]

Finally, as the Oklahoma court noted, many remedies are available for a party victimized by litigation misconduct, including vacation of the judgment with possible discovery or other sanctions in the reopened case if vacation is granted or, apart from the existing case, sanctions under the criminal law and bar disciplinary measures. Pet. App. 40a. Nothing in the Oklahoma Supreme Court's decision renders such remedies more available to defendants than to plaintiffs.

Thus, nothing in the Oklahoma Supreme Court's decision denying recognition of a remedy in tort for litigation misconduct as alleged by Patel distinguishes between plaintiffs and defendants and, accordingly, this case presents no equal protection issue.

C. THIS CASE DOES NOT IMPLICATE THE ADMINISTRATION OF JUSTICE IN THE STATE OF OKLAHOMA

Patel claims that "[t]he effect of [the Oklahoma Supreme] Court's decision in both [*Patel II* and *Patel III*] could hardly be more corrosive to the administration of justice in Oklahoma." Pet. 22. In support of this charge, Patel urges the

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[7] The Oklahoma Supreme Court's opinion in this case appears to place a limitation upon the remedies available to a party harmed by the litigation misconduct of its opponent (which implicitly limits the circumstances under which an abuse of process claim may be brought), but that limit applies to plaintiffs and defendants alike. Moreover, even if such allegations constituted the basis for an abuse of process claim, nothing in the *Patel III* decision indicates such a claim could be brought only by defendants.

Court to believe that the decision of the Oklahoma Supreme Court will (1) eliminate the duty of attorneys to disclose any frauds of which they are aware; (2) preclude the imposition of sanctions or other remedies for fraud discovered after judgment has been entered, thus encouraging attorneys to wait until after judgment to disclose a fraud on the court; and (3) promote fraud and a "catch-me-if you-can" mentality. Pet. 22-23. Patel's "parade of horribles" mischaracterizes the Oklahoma Supreme Court's decision and disregards time-honored ethical, criminal and civil remedies that provide ample incentive for attorneys and parties to avoid any hint of fraudulent activity.

First, the Oklahoma Supreme Court did not hold, as Patel suggests, that a judgment may never be vacated pursuant to OKLA. STAT. tit 12, § 1031 (1991) for fraud in which an attorney participated. Rather, the court merely recognized certain criteria which must be met by a party seeking to vacate a judgment on grounds of fraud. Indeed, the Oklahoma court remanded *Patel II* (which sought vacation of the judgment in *Patel I*) for evidentiary hearing and Patel herself could still obtain a vacation of the judgment on remand if she sought a hearing and proved the factors set forth in the court's opinion.

Further, as pointed out above, the Oklahoma Supreme Court expressly notes in *Patel III* that a myriad of other sanctions and remedies for litigation misconduct are available without requiring the creation of a new tort:

> If [Patel] is successful in vacating the Patel I judgment, discovery or other sanctions for the defendants' litigation-related misconduct in the original case may, if warranted, be imposed in the reopened case. Apart from the remedies available within the existing case, a party aggrieved by litigation-related misconduct may

> seek to invoke sanctions available under the criminal law and, in the case of attorney misconduct, by bar disciplinary measures.

Pet. App. 40a. The court thus makes it clear that its decision does not create an open-season for litigation-related fraud or other misconduct.

D. THERE IS NO BASIS FOR GRANTING CERTIORARI

Patel's only basis for seeking review is her claim that the Oklahoma Supreme Court decision violates the Equal Protection Clause and conflicts with this Court's equal protection decisions.[8] As shown above, the Oklahoma Supreme Court decision does not discriminate between plaintiffs as a class and defendants as a class. Accordingly, this case presents no equal protection issue, and it is unnecessary to discuss the decisions of this Court cited by Patel. Suffice it to say that none of those cases remotely suggests that a state court's determination not to recognize a cause of action in tort based on alleged litigation misconduct violates the Equal Protection Clause. There being no equal protection issues here, there is no basis for granting Patel's Petition.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

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[8] Much of Patel's Petition (Pet. 15-19) consists of argument, not about the Equal Protection Clause, but rather that the Oklahoma Supreme Court's decision departs from prior Oklahoma law and public policy. This is not true, but even if it were, that circumstance would create no equal protection issue and no occasion for review by this Court.

Respectfully submitted,

JOHN HENRY RULE
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(918) 595-4800

Counsel for Respondents

Dated: January 28, 2000

APPENDIX

IN THE DISTRICT COURT IN AND
FOR TULSA COUNTY
STATE OF OKLAHOMA
Filed: November 14, 1997

URVASHI B. PATEL,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No.
	)	CJ 93-5291
OMH MEDICAL CENTER, INC., an Oklahoma corporation, ST. FRANCIS HOSPITAL, INC., an Oklahoma corporation, and JOHN B. STEVENS, an individual,	)	
	)	
Defendants.	)	

ORDER ON PLAINTIFF'S PETITION TO VACATE JUDGMENT IN PART

The Court has reviewed and considered the parties' submissions on Plaintiff's Petition to Vacate Judgment in Part, including their briefs, affidavits, exhibits, oral arguments, and case authority.

After review of the materials presented, the Court finds that the Plaintiff's Petition to Vacate Judgment in Part should be granted. The bench conference reported on pages 612-617 of the Trial Transcript of February 24, 1995, shows that Plaintiff's counsel voiced specific concerns about the existence in the Plaintiff's credentialing file of a notation from either Dr. Rush or Dr. Carter responding to a negative evaluation

[Defendant's Exhibit 1] sent by Dr. Matson at Scotland Memorial Hospital where Plaintiff was previously employed. It is clear from the statement by Plaintiff's counsel that he was inquiring about Defendant's Exhibit 1 not being the complete documentation on this negative reference.

The following discussion occurred in the bench conference:

> THE COURT: I want to know what the status of the file is because if there is something that pertains to this particular evaluation then I think Cliff is entitled to have that produced to show the general circumstances under which it was produced. So without the complete file, you know, I can't really tell that because I think you are entitled to get it in if it is not complete or if there is something in the file that explains this more in detail than he is entitled to get that in too.
>
> MR. HENRY: Judge, how could it be incomplete? Do you read anything in here that would indicate this is not complete? [Page 614, lines 13-24]...
>
> THE COURT: ...The point is not that this document [Defendant's Exhibit 1] is incomplete but that there may be something in the file that references this document that explains it or further modifies it in some respect. He [Plaintiff's counsel] is entitled to have that produced too because otherwise I think it leaves a false intention and remind the jury [*sic* -- should read "false impression in the minds of the jury"] in regard to instances if Doctor wrote back or something or somebody else wrote the specific reference to this evaluation form and submitted by -- I can't read this guy's name.

MR. RIBNER: Matson.

THE COURT: Matson. He is entitled to have that produced. It is not presenting us from being admirable [*sic* -- should read "preventing it from being admissible"], it is just that it may not be admitted in its current form. If it doesn't show it totally [*sic* -- "the totality"] of the circumstances under which it was.

THE COURT: Present is [*sic*] in the file.

MR. HENRY: *There is nothing in the file of that nature.* [Emphasis added.] There are contradictory references from that city. [Page 615, lines 3-20]

Mr. Henry made a specific representation to the Court that there was nothing in the file of the nature about which the Court was clearly concerned. This representation was, in fact, false, there being in the file a typed memorandum by Karen Legg, OMH's risk manager, who kept the credentialing files, regarding a call from Dr. Parkes at Scotland Memorial, a memorandum on this very point and falling squarely within the category sought by the Court. Dr. Parkes called specifically to refute Dr. Matson's negative reference and to explain the circumstances under which Dr. Matson criticized the Plaintiff's professional conduct, a negative evaluation which Dr. Parkes stated was "strictly of a personal nature" and constituted a "lack of professionalism on Dr. Matson's part." [Legg memorandum] Mr. Henry made the representation knowing that the Court was relying on it as a true representation of the state of the file which was known to Mr. Henry but not to Mr. Ribner or the Court.

If Mr. Henry had responded that there was something in the file of that nature, the Court would have required it to be produced or would have excluded Defendant's Exhibit 1 on the basis that its admission, absent the additional file material,

would mislead the jury on the exact point on which Mr. Henry offered it, that the presence of a negative reference in the file was no impediment to a doctor's future employment.

Mr. Henry's misrepresentation to the Court and opposing counsel constitutes grounds under 12 O.S. Section 1031(4) to vacate the judgment on Plaintiff's tort claims entered on the jury verdict.

Plaintiff's Motion to Amend the Petition to Vacate is rendered most by this decision and the Court will therefore not address the merits of that motion.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Plaintiff's Petition to Vacate Judgment in Part is granted and the judgment entered March 22, 1995, on Plaintiff's tort claims is hereby vacated and set aside.

Dated: November 14, 1997

s/ Jane P. Wiseman
Jane P. Wiseman
District Judge

CERTIFICATE OF MAILING

I hereby certify that on the 14th day of November, 1997, a true and correct copy of the foregoing was mailed with postage prepaid thereon to: Mr. Clifford N. Ribner, 406 South Boulder, Suite 800, Tulsa, Oklahoma 74103; and Ms. Vivian Hale and Mr. Larry D. Henry, Gable, Gotwals, Mock, Schwabe, Kihle, Gaberino, 100 West Fifth, Tulsa, Oklahoma 74103.

s/ Carla K. Sewell
Deputy Court Clerk

§ 990.2 Time for appeal—Effect of post-trial motions

A. Post-Trial Motions Filed Within Ten (10) Days. When a post-trial motion for a new trial, for judgment notwithstanding the verdict, or to correct, open, modify, vacate or reconsider a judgment, decree or final order, other than a motion involving costs, attorney's fees or interest, is filed within ten (10) days after the judgment, decree or final order is filed with the court clerk, an appeal shall not be commenced until an order disposing of the motion is filed with the court clerk. The unsuccessful party may then appeal from the order disposing of the motion within thirty (30) days after the date such order was filed. If the decision on the motion was against the moving party, the moving party may appeal from the judgment, decree or final order, from the ruling on the motion, or from both, in one appeal, within thirty (30) days after the filing of the order disposing of the motion. Successive appeals from the original judgment, decree or final order and the order disposing of the motion shall not be allowed.

RULE 1.36 ACCELERATED PROCEDURE FOR SUMMARY JUDGMENTS AND CERTAIN DISMISSALS

(g) Appellate Review and Briefs. The appellate court shall confine its review to the record actually presented to the trial court. Unless otherwise ordered by the appellate court, no briefs will be allowed on review. If briefs are ordered, the appellate court will prescribe a briefing schedule. Motions for leave to submit appellate briefs shall be deemed denied unless affirmatively granted by the court. No briefs shall be tendered by attachment to a motion for leave to brief, and the clerk shall not accept or file an appellate brief without prior leave of the court. A motion for appeal related attorney's fees must be made by motion prior to mandate. See Rule 1.14.

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

Urvashi B. Patel, Plaintiff-Appellant, vs. OMH Medical Center, Inc., an Oklahoma corporation, St. Francis Hospital, Inc., an Oklahoma corporation, Larry D. Henry, an individual and Arrington, Kihle, Gaberino & Dunn, Inc., Defendants-Appellees.	)	No. 89582

PLAINTIFF'S-APPELLANT'S SUPPLEMENTAL SUGGESTION REGARDING CLEARLY-CONTROLLING LEGAL AUTHORITY NOT INCLUDED BY EITHER PARTY IN THEIR BRIEFS, DUE SOLELY TO INADVERTENCE

Plaintiff-Appellant Dr. Urvashi Patel ("Plaintiff") hereby files this her Supplemental Suggestion Regarding Clearly-Controlling Legal Authority Not Included By Either Party In Their Briefs, Due Solely To Inadvertence, as follows:

This Court has, by Order, retained this appeal brought by Plaintiff from the Trial Court's judgment dismissing her claims against Defendants-Appellees ("Defendants"). The Trial Court determined such claims simply are not cognizable in Oklahoma. Such claims are, in essence, that all Defendants, including Larry D. Henry and Arrington Kihle et. al. -- who

were and remain attorneys for the remaining, non-lawyer Defendants -- committed grotesque acts of deception on Plaintiff and the Trial Court which resulted in the destruction of Plaintiff's case against such remaining Defendants. In the related case to this one, which Defendants have appealed and which this Court has also retained -- Appeal No. 90489 -- Judge Wiseman, on more than sufficient evidence, ruled that all the Defendants in the present case *in fact committed* a number of the acts of deceit on the Court and Plaintiff which are alleged in Plaintiff's Petition in this case.

Apparently central to the Trial Court's ruling in this case was the argument, advanced by Defendants below, that Oklahoma has some public policy precluding any civil liability for such otherwise clearly reprehensible, let alone tortious, misconduct as is alleged by Plaintiff. Plaintiff has consistently disputed any such notion.

This Court should be advised that, almost by happenstance, the undersigned recently stumbled upon a long-standing statute -- 21 O.S. 1910 §575 ("§575") -- which unmistakably and unambiguously negates *any* possibility that Oklahoma has *any* such public policy supporting civil immunity for any of the Defendants herein. Indeed, §575 unmistakably requires this Court to reverse the Trial Court's dismissal of Plaintiff's claims herein. It has not previously been briefed herein by any of the parties, no doubt due solely to inadvertence.

§575 *expressly imposes* civil liability equal to *treble* damages on every attorney who "is guilty of any deceit…with intent to deceive the Court or any party…" Such is *precisely* what is alleged against *all* the Defendants -- attorneys and non-attorneys alike -- in this case. Although §575 may *appear* applicable only to attorneys, Title 21's general principle of accomplice liability *necessarily extends its reach* to non-lawyers as well. This is because, pursuant to 21 O.S. 1910

§172, the *remaining*, non-lawyer Defendants in this case, as the result of acting in *concert* with Mr. Henry and his law firm in the complained-of acts of deceit on the Court and Plaintiff, constitute *additional* principals, *equally* culpable, under 21 O.S. §575, as co-conspirators, with their lawyers. *Nothing* in 21 O.S. §575 purports to immunize non-lawyer accomplices from this usual rule of accomplice liability.

Moreover, Oklahoma has long imposed joint liability on aiders and abettors for all civil purposes. *See* Restatement (Second) of Torts §§875 and 876, *based on*, as stated in the Appendix thereto, *Keel v. Hainline,* 331 P.2d 397 (Okla. 1958) (Aiders and abettors fully liable for principal's torts.) *See* also *Rodebush v. Okla. Nursing Homes, Ltd.,* 867 P.2d 1241 (Okla. 1993) (Respondeat superior liability for actual and punitive damages for agent-employee's intentional tort imposed on principal). In this case it is indisputable that the lawyer Defendants were at all times the agents of the other Defendants.

21 O.S. 1910 §131 makes clear that the fact that §575 provides for a *specific* (treble damages) remedy against attorneys for such acts of deceit should in no way preclude *additional,* civil or criminal remedies against both such attorneys and their accomplices, (i.e., that statute makes the maxim "expressio unius est exclusio alterius" *inapplicable*).

Accordingly, not only does Oklahoma have *no* public policy of immunity applicable to any of the Defendants for their complained-of misconduct involved in this case, long-standing, clearly-legislated Oklahoma public policy is, rather, *precisely the opposite* and *expressly requires* that Defendants not only compensate Plaintiff for their grotesque misconduct but also that they do so many times over and be subjected to whatever additional punitive sanctions and remedies the Trial Court and, ultimately, a jury, may deem sufficient.

The additional statutes discussed in this supplement leave no doubt that the judgment of Judge Peterson involved in this appeal must be reversed as directly contrary to long-standing Oklahoma law.

Respectfully submitted,

s/ Clifford N. Ribner

Clifford N. Ribner, OBA No. 7535
320 South Boston Avenue, Suite 825
Tulsa, Oklahoma 74103
(918) 582-9200

Attorney for Plaintiff-Appellant

CERTIFICATE OF SERVICE

I, Clifford N. Ribner, hereby certify that on the 20 day of July, 1998, caused a true and correct copy of the above and foregoing document to be deposited in the United States Mail to:

James M. Sturdivant
Larry D. Henry
Gable Gotwals et al.
1000 OneOk Plaza
Tulsa, Oklahoma 74103

Tulsa County Court Clerk
Tulsa County Courthouse
500 South Denver
Tulsa, Oklahoma 74103

with first class postage properly affixed thereon.

s/ Clifford N. Ribner

Clifford N. Ribner

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

Urvashi B. Patel, Plaintiff-Appellant, vs. OMH Medical Center, Inc., an Oklahoma corporation, St. Francis Hospital, Inc., an Oklahoma corporation, Larry D. Henry, an individual and Arrington, Kihle, Gaberino & Dunn, Inc., Defendants-Appellees.	)	No. 89582

MOTION TO RETAIN APPEAL IN SUPREME COURT PURSUANT TO RULE 1.24

Plaintiff-Appellant Urvashi B. Patel hereby files this her Motion to Retain Appeal in Supreme Court Pursuant to Rule 1.24 of the Supreme Court Rules. This appeal should be retained both because the issues raised in this appeal (1) involve an area of law undecided in Oklahoma and (2) concern matters which will affect public policy and any decision is likely to have widespread impact. Such issues relate to the integrity of judicial proceedings and to actions by parties and attorneys during the course of such proceedings.

Specifically, this case raises the following issues:

1. Does a party defendant and/or its trial attorneys, such as all the Defendants-Appellees in this case, enjoy an

absolute immunity from all claims arising out of their conduct at trial, including their knowing procurement of false testimony, fraudulently manufactured documents and/or fraudulent representations to the trial judge made by them in an effort to obtain the admission of such false "evidence", notwithstanding the fact that such false "evidence" results in the destruction of the plaintiff's lawsuit for damages -- her chose in action -- against such defendant?

2. Does Oklahoma recognize an action for money damages, such as Plaintiff Dr. Urvashi Patel has brought here against the Defendants herein, arising out of the claim that an adverse party in a lawsuit prevailed at trial primarily by knowingly presenting despoiled and/or fraudulently manufactured "evidence" and/or perjurious testimony, uttered by the party and/or its trial attorneys, either from the witness stand, or separately to the trial judge, or both, all with the active complicity of such party's lawyers, as a species of prima facie or indeterminate tort?

3. Does Oklahoma recognize an action for money damages, such as Plaintiff Dr. Urvashi Patel has brought here against the Defendants herein, arising out of the claim that an adverse party in a lawsuit prevailed at trial primarily by knowingly presenting despoiled and/or fraudulently manufactured "evidence" and/or perjurious testimony, uttered by the party and/or its trial attorneys, either from the witness stand, or separately to the trial judge, or both, all with the active complicity of such party's lawyers, as a species of fraud?

The Oklahoma Supreme Court has not yet specifically ruled on whether it recognizes an independent tort of spoliation

-- that is, the intentional destruction, defacement or fabrication of evidence. Courts in Alaska, Ohio, California, New Jersey and Illinois have explicitly recognized the intentional or reckless spoliation of evidence as a separate, new tort. *Hazen v. Municipality of Anchorage,* 718 P.2d 456 (Alaska 1986); *Smith v. Howard Johnson Company,* 67 Ohio St. 3rd 28, 615 N.E. 2d 1037 (1993); *Smith v. Superior Court,* 151 Cal. App. 3rd 491, 198 Cal. Rptr. 829 (1984); *Viviano v. CBS, Inc.,* 251 N.J.Super. 113, 597 A.2d 543 (1991); *Boyd v. Travelers Insurance Company,* 166 Ill.2d 188, 652 N.E. 2d 267 (Ill. 1995).

As the United States Circuit Court of Appeals for the Tenth Circuit noted in *Merrick v. Northern Natural Gas Co.,* 911 F.2d 426 (10th Cir. 1990), prima facie, or indeterminate, tort pursuant to Restatement (Second) §870 "has been adopted in only a handful of states, *including Oklahoma*...(Emphasis added)" 911 F2d at 433. That Restatement section recognizes as tortious any unjustified, intentional act which causes harm to another.

Numerous Oklahoma cases, have long stood for the proposition that the legal principle advanced by Restatement §870 is indeed Oklahoma law. *Mangum Electric Co. v. Border,* 222 P. 1002, 101 Okla. 64 (Okla. 1924); *Panther v. McKnight,* 256 P. 916, 125 Okla. 134 (1927); *Stebbins v. Edwards,* 101 Okla. 188, 224 P. 714 (1924); *Hibbard v. Holiday,* 58 Okla. 244, 158 P. 1158 (1916); *Schonwald v. Ragains,* 32 Okla. 223, 122 P.203 (1912). Under this unbroken, and unrepealed, line of authority, absent some special privilege for the Defendants-Appellees, the facts alleged in the Petition should be cognizable as tortious under Oklahoma law. Nevertheless, the Trial Judge in this case apparently believed that language in *Cooper v. Parker-Hughey,* 894 P.2d 1096 (Okla 1995), precluded such result, notwithstanding that case's clearly distinguishable facts.

The issues involved in this appeal were the subject of a recent, scholarly article in the Oklahoma Bar Journal - Margaret A. Nunnery, *Evidence Destruction: Civil Liability for Spoliation in Oklahoma,* 68 OBJ #13 at p. 1057 (Mar. 29, 1997), which specifically noted their importance and unresolved state. The importance of such issues to the administration of justice in this State and to the public's image of the bar and the Courts is self-evident.

In dismissing Plaintiff's claims, the Trial Judge ruled that attorneys and parties enjoy an absolute, prophylactic immunity from liability for even such grotesque criminal and ethical violations as are alleged in the Petition in this case, as a matter of public policy. If there is such a public policy, what is its basis in logic or morals? Such issues clearly require resolution by the Supreme Court alone. Whether this Court agrees with the Trial Court's view, or finds it repugnant, it is imperative that this Court's opinion on these matters be known at the earliest possible date.

This case raises these issues with crystal clarity inasmuch as it involves extreme allegations against both parties defendant and their attorneys, all arising from the simplest, though well-briefed, record possible (the granting of a motion to dismiss). Accordingly, it would be difficult to imagine a more perfect case for this Court to consider these gravely important issues.

The undersigned has contacted Defendants and they have stated they have no objection to this Motion.

Respectfully submitted,

s/ Clifford N. Ribner

Clifford N. Ribner, OBA 7535
320 South Boston, Suite 825
Tulsa, OK 74103
(918) 582-9200

Attorney for Plaintiff-Appellant

CERTIFICATE OF MAILING TO ALL PARTIES AND COURT CLERK

I, hereby certify that a true and correct copy of the above and foregoing instrument was mailed this 16 day of June, 1997, to:

James M. Sturdivant
Larry D. Henry
Gable, Gotwals, et al.
100 W. Fifth, Suite 1000
Tulsa, OK 74013

by depositing in the U.S. Mails, postage prepaid.

I further certify that a true and correct copy of the above and foregoing instrument was mailed to, or filed in, the Office of the Tulsa County Court Clerk on the 16 day of June, 1997.

s/ Clifford N. Ribner

Clifford N. Ribner